

ARKANSAS SUPREME COURT

No. CR 08-500

JOHNNY L. CRAIG
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered October 30, 2008

PRO SE MOTION FOR EXTENSION
OF BRIEF TIME [CIRCUIT COURT OF
JEFFERSON COUNTY, CR 2005-487,
HON. ROBERT H. WYATT, JR.,
JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2005, appellant Johnny L. Craig was found guilty by a jury of felony criminal mischief, committing a terroristic act, and two counts of aggravated assault. He was sentenced as a habitual offender to an aggregate term of 792 months' imprisonment. The Arkansas Court of Appeals affirmed. *Craig v. State*, CACR 06-17 (Ark. App. Jan. 17, 2007). Subsequently, appellant timely filed in the trial court a verified pro se petition under Arkansas Rule of Criminal Procedure 37.1. The circuit court denied the petition, and appellant has lodged a pro se appeal here from the order.

Now before us is appellant's pro se motion for an extension of time to file his brief-in-chief. As appellant could not be successful on appeal, the appeal is dismissed and the motion is moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005) (per curiam).

The petition filed in the trial court contained a number of claims: (1) violation of the Confrontation Clause; (2) lack of substantial evidence to support his conviction for an "uncharged

crime” concerning the value and damage to one victim’s car; (3) ineffective assistance of counsel based upon a conflict of interest; (4) generally, a denial of a fair and impartial trial; (5) generally, actual innocence; (6) generally, actual or constructive denial of counsel; (7) generally, denial of due process; (8) ineffective assistance of counsel based upon failing to preserve for appellate review all of the claims raised in the Rule 37.1 petition.

For his first argument in the petition, appellant claimed that his right to confront one of the victims, Antonio Alexander, under the Sixth Amendment to the United States Constitution was precluded because the State failed to produce him at trial for cross-examination. Appellant also complained that Alexander’s absence from trial was not explained to appellant. Appellant cited no facts or legal arguments in this allegation.

The claim has no merit. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). In addition, an argument, even a constitutional one, will not be considered where the appellant presents no citation to authority or convincing argument in its support. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003).

Appellant next argued in the petition that the State failed to prove, by expert testimony or otherwise, the amount that the other victim, Bennie Higgins, paid for his vehicle as well as the amount of damage caused by appellant to the vehicle. Appellant contended that, as a result, he was denied a fair trial and due process of law by being convicted of an “uncharged crime.” This argument amounted to a challenge to the sufficiency of the evidence supporting appellant’s conviction for criminal mischief.

Sufficiency of the evidence can not be raised in a Rule 37.1 proceeding. *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000). Moreover, in the direct appeal, appellant raised insufficiency

of the evidence with regard to all charges. Rule 37.1 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

In the third allegation, appellant asserted that trial counsel was ineffective because a conflict of interest adversely affected counsel's performance and his ability to represent appellant. This alleged conflict of interest arose because counsel was involved in a political campaign to be elected prosecutor for the Eleventh Judicial Circuit, which included Jefferson County. Appellant surmised that trial counsel's failure to notify the court about the election campaign was the source of the purported conflict.

Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson, supra*. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

Appellant failed to demonstrate that counsel was ineffective or that his defense was prejudiced by counsel's political campaign. Other than the broad accusation that counsel's ineffective assistance resulted directly from the alleged conflict of interest, appellant presented no facts to support the argument. Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* Also, appellant's conclusory statements cannot be the basis of postconviction relief. *Jackson, supra*.

As appellant failed to establish that an actual conflict of interest existed, prejudice will not be presumed. *Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002) (citing *Cuyler v. Sullivan*, 446

U.S. 335 (1980)). If prejudice was not presumed, the burden was thus placed on appellant to provide facts to support his claims of prejudice. *Nelson, supra*. However, appellant presented no facts demonstrating prejudice to support his allegation of conflict of interest.

The next four claims contained in the Rule 37.1 petition were general in nature. Appellant complained of denial of a fair and impartial trial, actual innocence, denial of due process, and actual or constructive denial of counsel. These allegations amount to mere legal conclusions without any facts in support, and conclusory assertions cannot be the basis of postconviction relief. *Jackson, supra*. Moreover, appellant cited no authority or convincing arguments to support these conclusions, and the contentions could not be considered. *Weatherford, supra*. As to appellant's contention that he was actually innocent of the charges, a claim of actual innocence is a direct challenge to the sufficiency of the evidence that supported the convictions and is not cognizable in a Rule 37.1 petition. *Sanford, supra*.

Finally, appellant maintained that the claims set forth in the Rule 37.1 petition concerned issues that trial counsel failed to raise at trial, causing appellate counsel to file a no-merit brief in the direct appeal. In addition to being conclusory and containing no authority or convincing arguments, this averment is meritless as appellant failed to demonstrate that trial counsel would have prevailed if these arguments were raised in the circuit court below. Counsel cannot be found ineffective for failing to make an argument that has no merit. *Noel, supra*.

Appeal dismissed; motion moot.